IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD,

Petitioner,

versus

UNITED STATES OF AMERICA

OPPOSITION OF PETITIONER TO THE APPLICATION OF THE ACTING SOLICITOR GENERAL FOR PERMISSION TO BE GRANTED TO THE LOUISIANA STATE BAR ASSOCIATION TO FILE A BRIEF AND MAKE AN ORAL ARGUMENT HEREIN.

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The petitioner respectfully but earnestly opposes the request of the Acting Solicitor General, that the Louisiana State Bar Association be permitted to submit a brief and make an oral argument in this case.

If petitioner believed that the Bar Association, if allowed to intervene, would fairly limit its argument to the issues included in the present record, petitioner would have much less objection.

But, as we will show, ever since the chief argument and complaint of the Bar Association against petitioner was not considered, but on the contrary was definitely excluded from the decision and opinion of the Louisiana Supreme Court, every step of the Bar Association has been motivated only by its desire to get some other tribunal to include and act on the charge of alleged personal fault, which the Louisiana Supreme Court had refused to consider.

In addition, there are serious technical reasons why, as we believe, the Bar Association lacks capacity to gain this Court's permission to enter into this case.

I.

The Solicitor General has already filed a complete brief in this matter and he and his staff were and are entirely informed as to the sole issue presented by the present petition,—whether the disbarment of an attorney, based exclusively on the ground of mental illness eighteen years previous,—the disbarment decision expressly excluding all consideration of personal fault or willful misconduct—constitutes (when the attorney has, concededly, fully regained his health and has already for many years been restored to active and honorable law practice) a deprivation of the attorney's property right to practice his profession without substantive due process.

The Solicitor General has already fully presented his argument on this point in his brief on file; and his request that the Grievance Committee be now allowed to enter into the case can only reflect either his own personal preference or else the pressure of a few members

of the said Grievance Committee, and certainly cannot be the result of any real necessity for any such intervention.

The Committee has shown an animus against the petitioner in this case, both in the Louisiana Supreme Court and in the federal courts, that is not easily explained. However, it is believed that the explanation lies in the fact that the Committee, due to the limited decree of the State Supreme Court, which disbars petitioner on the ground of mental illness eighteen years previous and on nothing else, has failed to maintain any serious cause of action for disbarment against petitioner.

In its original complaint against petitioner, the Committee charged willful misconduct as its alleged cause for disbarment. When the State Court refused to consider this charge and limited its decision against petitioner to a decree excluding all questions of personal or professional fault, and handed down a disbarment on the exclusive ground of mental illness eighteen years before, this was a rude shock to the experienced lawyers who make up the Committee, and since that time the Committee has done its utmost to intervene in one proceeding after another, in the hope of ultimately securing a decree or at least an expression from some tribunal, which would at least imply or suggest actionable misconduct on the part of petitioner.

They have followed this course incessantly, because they well realized how shaky, uncertain and, as we think, definitely unconstitutional, was the decree of petitioner's disbarment, based merely on illness (especially when rendered in a jurisdiction where, under the State Constitution, the sole ground for disbarment is willful misconduct).

And so, the Committee is now at the door of this Court, hoping, although there is no charge and not one word of misconduct in this record, and nothing in the record to support their original averments, that, in some way, they may be able to enlarge the issues and, despite the fact that petitioner was ill, not conscious of his acts and irresponsible, they may, in some miraculous way, get this tribunal to adopt their original misconduct charge, although the record is made up only of the State disbarment decree itself, which excluded misconduct.

This is the third time the Committee has attempted this technique in the present proceeding. The District Court, Hon. Herbert W. Christenberry, would not allow the Committee to remain in the case into which they had come without permission, but permitted Mr. Schillin to make an oral argument as an individual, with the distinct understanding and ruling, however, that he would not be considered as a party.

In the Circuit Court of Appeals, without even worrying to obtain the Court's permission or consent, the Committee printed its name and that of its Chairman on the cover of the brief of the United States Attorney. This was protested at the hearing, and the Chief Judge indicated marked astonishment at the presence of the Committee in the case.

II.

The technical objections to the appearance of the Grievance Committee here, are of the utmost seriousness:

The Grievance Committee (if constitutionally organized—which we doubt very much) cannot go beyond

the Charter under which it was organized and which is the raison d'être of its existence.

The Charter of the Louisiana State Bar Association is reproduced in Louisiana Revised Statutes of 1950, West LSA Edition, Vol. 21, pages 349 to 403.

The subject "Discipline and Disbarment of Members" is in Article 13, Sections 1 to 9 (pages 377 to 389). The Committee investigates charges of professional misconduct, and, in its sole discretion, institutes disbarment action in what it considers to be proper instances. Its decision that, in its opinion, no action is justified in any case, is not subject to any control or supervision whatever. When it decides that suit is needed, the Charter (Article 13, Section 4, p. 380, Vol. 21, Revised Statutes) specifically states that the duty of the Committee is discharged by an action "in the Supreme Court" (of Louisiana). Nowhere do we find that the Committee is authorized to act, or make appearance, or prosecute in any other Court.

Therefore, we would feel (even if this Committee was organized under valid Louisiana law), that it would have no right to intervene and prosecute in any Court other than the Supreme Court of Louisiana. But is the Committee validly and legally organized? This brings us to the third point of this opposition.

III.

In Louisiana, disbarment is wholly and exclusively within the power and jurisdiction of the State Supreme Court, under a special grant of original jurisdiction.

Louisiana Constitution, Article VII, Section 10:

> "It (the Supreme Court) shall have exclusive original jurisdiction in all disbarment cases involving misconduct of members of the bar, with the power to suspend or disbar under such rules as may be adopted by the Court. . . ."

As shown, the Court may make Rules to carry this grant of power into effect.

Article 13 of the Charter of the State Bar Association (Louisiana Revised Statutes, Vol. 21, pages 377 to 389) is a Rule of the Supreme Court, made so by the Order of the Court. (See text of Order, at page 353 of said Volume 21).

We concede, of course, that the Court may select deputies and constitute committees to attend to the details in disbarment matters. As seen, it may make "such rules as may be adopted by the Court".

But we must remember that, even the integrated bar of the State of Louisiana enjoys no legislative superiority over the State Constitution.

Under that Constitution, only the Supreme Court,—no other agency or unit of State government,—can control and direct "all disbarment cases".

It necessarily follows that the members of this Grievance and Ethics Committee, which is to exercise plenary powers over all investigations, all prosecutions, or all conclusions not to prosecute, in any given case involving professional misconduct, must be appointed by the Supreme

Court. Only the Supreme Court itself can delegate its constitutional authority to persons who are going to act for it. No other agency can do so or in any way control the power or discretion of the Court in that regard. It is the responsibility of the Court itself, which it cannot share with anyone else, and which no one else can assume; particularly, no one else can control the Court in the execution of the grave responsibility of seeking a personnel for its Grievance and Ethics Committee.

It is submitted that the Charter of the State Bar Association definitely violates this basic rule; for it declares, clearly and specifically, that the members of this Committee shall, and can only, be appointed and selected by the Supreme Court "on the recommendation of the Board of Governors" of the association. See Article 13, Section 1; Revised Statutes, Vol. 26, p. 377. If the Court can only appoint members of this Committee who are recommended by the Board of Governors, it is perfectly clear that the Court can appoint only such members as have Association approval, and that the Board of Governors, if it will not recommend a certain individual, makes it impossible for the Court to appoint that person, no matter how earnestly the Court may wish to do so. Obviously, when the Constitution gives absolute power to the Court to control disbarment and to make rules and to appoint deputies and representatives, it is clear that the Court has been shorn of its Constitutional power, when it can only make an appointment which is satisfactory to and has the recommendation of someone else.

And further, unless the Bar Association is willing, the Supreme Court can do nothing about this emasculation of its Constitutional prerogative.

The Court can do nothing even to change this Rule. The rule can be changed only by the Board of Governors of the Association. Article 15 of the Charter of the Association (Volume 21, page 403) provides unmistakably that the

> ". . . articles of Incorporation, except Articles 12 and 13, may be amended by a majority vote . . . . Articles 12 and 13 can be amended only by a vote of the Board of Governors, approved by the Supreme Court".

This Article 13 which can only be changed when the Bar Association Board of Governors is willing to change it, is the Section now under consideration.

Before the Supreme Court can change the rule which unconstitutionally limits its powers of appointment, or with reference to the subject of disbarment within its exclusive prerogative under the Constitution, the Board of Governors must permit the Court to do this.

———o———

A Committee, organized under such dubious Constitutional ægis and whose right to act even in the State of Louisiana is so beset with serious doubt, does not speak with any authority for anyone. It cannot properly replace the Solicitor General in the discharge of his functions as representative of the Department of Justice in litigated matters in this Court.

The Acting Solicitor General, doubtless because of his lack of information on the structure and validity of the quoted Articles of said Charter and of the Louisiana

Constitution, was therefore mistaken when he urged, in his recent Application and Memorandum, that this Grievance Committee represents validly and legally probably eighty per cent of the lawyers practicing in the federal districts in Louisiana. In point of fact, the Committee represents no one, and can add nothing to the discussion in this Court, except a discussion as to its constitutional infirmity and an involvement of this Court into the discussion of a local question which the petitioner himself had not raised until the Committee itself, with the acquiescence and under the sponsorship of the Acting Solicitor General, apparently concluded that it would come into this jurisdiction to supersede the regular officers and representatives of the Government of the United States and of the Department of Justice in this type of case.

It is submitted that the application of the Acting Solicitor General herein should not be granted.

—o—

Finally, how can this Committee or anyone else undertake to foster and promote a disbarment exclusively grounded, not on personal or professional dereliction, but exclusively on previous mental illness, when the very Constitutional Article which invested the State Supreme Court with jurisdiction in such matters only permitted disbarment in Louisiana for willful misconduct. How can anyone seriously and in good faith maintain that the disbarment of a lawyer by a State Court judgment based only on mental illness eighteen years ago and specifically excluding all claims of personal fault or professional misconduct, present a case of willful misconduct as to which

alone this Committee, even if we admit its legal qualifications and rights, is permitted to act in any disbarment proceeding in Louisiana.

Respectfully submitted,

DELVAILLE H. THEARD,
Petitioner,
Pro Se.

CERTIFICATE OF SERVICE.

I hereby certify that copies of the foregoing opposition were served on the Acting Solicitor General of the United States, by depositing same in the mail, duly addressed, prepaid, on this 10th day of August, 1956.